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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 115

CURTIS B. DALL,

Petitioner,

vs.

VICTOR S. JOHNSON, JR., Administrator *de bonis non* of the Estate of VICTOR S. JOHNSON, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

ALEXANDER KAHAN,
Attorney for Petitioner.

Of Counsel:
JOHN J. O'CONNOR,
HARRY J. PASTERNAK.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Hon. Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Curtis B. Dall respectfully prays that a writ of certiorari issue to review an order of the Supreme Court of the State of Illinois entered March 16, 1950, denying your petitioner's petition for leave to appeal from an order of the Appellate Court of Illinois, First District, entered November 21, 1949, which order affirmed the judgment order of the Circuit Court of Cook County, Illinois, entered November 9, 1948, which judgment order affirmed the judgment order of the Probate Court of Illinois, entered January 29, 1948, dismissing petitioner's petition and claim filed in the Probate Court of Illinois against Alex Thomson as administrator of the Estate of Victor S. Johnson, Deceased, and to review all of the said judgments and orders.

Opinions Below.

The opinion of the Appellate Court of Illinois, First District filed on November 21, 1949, appears in folios 31-41 herein and in Advance Sheet No. 2 of 339 Illinois Appellate Court Reports, at page 113.

Jurisdiction.

Jurisdiction to issue the writ requested is found in Title 28, U. S. Code, Sec. 1257 (3).

Questions Presented.

1. Where the Probate Court of Illinois, lacking jurisdiction of the subject matter, illegally assumed jurisdiction, to the exclusion of the Federal Court, of petitioner's claim against respondent, contrary to the laws and decisions of the State of Illinois, refusing to permit petitioner to progress his prior identical claim in the Federal Court upon a contract executed in New York and performed in Tennessee, and determined, upon demurrer, that the contract sued upon was illegal in that it allegedly violated the Federal Natural Gas Act and was against public policy of the State of Illinois, did this illegal assumption of jurisdiction violate petitioner's rights under the Fourteenth Amendment of the Constitution of the United States, in that it deprived petitioner of his property without due process of law, by virtue of the fact that the Probate Court of Illinois, by its illegal assumption of sole jurisdiction and its entry of judgment with costs, dismissing plaintiff-petitioner's complaint on the merits upon demurrer, deprived petitioner of a trial in the Federal Court, a forum having jurisdiction of the subject matter of the suit and having earlier acquired jurisdiction thereof?

2. Does the rule that the Federal Court will generally follow decisions of the state courts as to jurisdiction of the state courts apply, where the particular decision of the state court, as in the instant case, is contrary to prior determinations of the same state court concerning such jurisdiction and where the lack of jurisdiction is virtually admitted by a later legislative enactment attempting to confer such jurisdiction, which legislation itself is in violation of the Constitution of the State of Illinois, thereby violating petitioner's right to equal protection of the laws under the Constitution of the United States?

3. Where the principal ground for holding invalid the contract sued upon, is the alleged violation of a federal statute to wit: the Federal Natural Gas Act, the alleged violation having been determined with respect to sections of such act never before construed or interpreted by any court of the United States, will this court take jurisdiction of the cause for the purpose of interpreting and construing such federal statute, not only for purposes of this case but also as a matter of national public interest in the regulation of the natural gas industry?

4. Where the courts of Illinois apply the alleged local public policy of the State of Illinois to a contract executed in the State of New York and performed in the State of Tennessee and find it violative of the public policy of Illinois, and where the alleged violation of public policy does not consist of any matter or thing *malum in se*, and the enforcement of the contract is not so repugnant to Illinois vital interests as to justify non-enforcement, but where all the rights under said contract lawfully vested elsewhere and where the obligations of the contract were valid in the State of New York at the place of execution and in the

State of Tennessee at the place of performance thereof and only an accounting and the delivery of the stock due the petitioner under the said contract was sought in the State of Illinois, is such action by the state courts of Illinois, a deprivation of property without due process of law under the Fourteenth Amendment of the Constitution of the United States?

Summary Statement of the Matters Involved.

On March 5, 1940 appellant and Victor S. Johnson entered into a certain contract which was executed in the State of New York (fols. 1, 10-15). The respondent herein is the administrator of the estate of said Victor S. Johnson, the latter having died prior to the commencement of this action. The said contract in substance provided for the organization of a corporation (Tennessee Gas & Transmission Company). Under the contract petitioner agreed to go to Nashville, Tennessee and take charge of a program for raising certain funds in connection with such venture. The contract also contained other provisions, terms and conditions, the specific provision herein sued upon being the last sentence of paragraph 4 of said contract (fols. 12-13) which provides that petitioner and the decedent should divide equally certain common stock which might accrue to them thereunder.

Victor S. Johnson died in August, 1943 and Alex Thomson was named administrator of his estate. Thereafter Alex Thomson died and Victor S. Johnson, Jr., respondent herein, was named administrator *de bonis non* of the said estate.

On June 13, 1946 petitioner instituted suit in the U. S. District Court for the Northern District of Illinois, Eastern Division, alleging in substance that the decedent received

certain shares of common stock of Tennessee Gas & Transmission Company under the said contract to wit: 30,000 shares, half of which shares belonged to petitioner, and petitioner demanded delivery of 6,142.5 shares, the number of shares then due petitioner after certain allowances and adjustments not here relevant. Defendant in that suit (respondent herein) moved in the U. S. District Court to dismiss the suit on the ground that only the Probate Court of the State of Illinois had jurisdiction of the suit, in view of the fact that decedent was a resident of the State of Illinois at the time of his death. Petitioner herein was then and is now a resident of the State of Texas, and the U. S. District Court suit had been commenced on the ground of diversity of citizenship and the requisite jurisdictional money amount. Petitioner, apprehensive of the effect of a nine months statute of limitations in the State of Illinois, filed a petition and claim in the Probate Court of the State of Illinois on or about November 22, 1946. Upon application of the respondent herein, the Probate Court of the State of Illinois on June 5, 1947 issued an order, over the objection of petitioner that the Probate Court of Illinois lacked jurisdiction of the cause, determining that it alone had sole and exclusive jurisdiction of petitioner's claim, despite the fact that respondent's motion to dismiss in the U. S. District Court was then pending undetermined. The said motion in the U. S. District Court has never been decided and petitioner's action for the same relief originally brought therein, is still pending undetermined. It is contemplated that respondent will undoubtedly move to dismiss such action on the basis of the judgment entered in the Probate Court of Illinois, dismissing petitioner's petition therein, upon the grounds of *res judicata.*

Thereafter respondent moved by demurrer in the Probate Court of Illinois, which had assumed exclusive jurisdiction, to dismiss petitioner's petition and claim on the ground among others that such petition and claim was founded upon a contract violative of the Federal Natural Gas Act and against the public policy of the State of Illinois. Despite the fact that such contract was executed in the State of New York and performed in the State of Tennessee and that one of the parties thereto (petitioner) was not at any time a resident of the State of Illinois, the Probate Court of the State of Illinois granted such motion and entered judgment for respondent on the ground that the contract violated the Federal Natural Gas Act and the public policy of the State of Illinois.

Appeal was taken by Petitioner to the Circuit Court of the State of Illinois, Cook County, which affirmed the order of the Probate Court without opinion.

Petitioner then appealed to the Appellate Court of the State of Illinois which affirmed with opinion (fols. 31-41). Leave to appeal to the Supreme Court of the State of Illinois was denied on March 16, 1950 after a motion for reargument in the Appellate Court of Illinois had been denied.

The only formal opinion rendered in this case was by the Appellate Court of the State of Illinois, which held that the contract sued upon was illegal on the ground that it violated the Federal Natural Gas Act, in that an officer of a natural gas company was to receive compensation for raising funds for the corporation and that it violated public policy of the State of Illinois on purely local principles in connection with corporate responsibilities (fols. 31-41).

Reasons Relied on for Allowance of Writ.

1. The Probate Court of the State of Illinois, by its order of June 5, 1947, illegally assumed jurisdiction herein and illegally excluded and ousted from jurisdiction the U. S. District Court for the Northern District of Illinois, Eastern Division. In doing so the Probate Court deprived petitioner of a right guaranteed to him by the Fourteenth Amendment to the Constitution of the United States to wit: a fair trial in a Court or forum of competent jurisdiction. The Probate Court of Illinois is a constitutional court of limited jurisdiction (Sec. 20 or Article 6 of the Constitution of the State of Illinois). Under applicable decisions of the courts of the State of Illinois, the Probate Court had no jurisdiction of a claim for recovery of shares of stock, the character of the claim asserted by petitioner. The general rule that the federal courts will not review decisions of state courts pertaining to jurisdiction of state courts does not apply in the instant case, because the decision of the state courts of Illinois as to jurisdiction of the Probate Court in the instant case, is contrary to all prior decisions in like cases and constitutes *ex post facto* legislation by the judiciary.

2. The construction and interpretation by the Illinois Courts of the Federal Natural Gas Act (U. S. C. A. Title 15 Secs. 717a through 717w) is contrary to the expressed purpose and intent of the Congress at the time the act was passed and at the time the act was amended, at both of which times the Congress demonstrated the unequivocal intention that the Federal Natural Gas Act should not and does not apply until the corporation is actually engaged in the transportation or sale in interstate commerce of natural gas. In holding that the Federal Natural Gas Act

applies to a corporation contemplating engaging in the transportation of natural gas in interstate commerce, the courts of Illinois interpreted the act in a manner inconsistent not only with the express provisions thereof but also inconsistently with and contrary to the obvious purpose and intent of the Congress. By virtue of this erroneous construction of the Federal Natural Gas Act by the Illinois courts, the express will and intention of Congress has been completely negated and violated, and if not corrected by this Court, may well result in numerous different interpretations of the act by different states' courts, when it is of the utmost importance that there be uniformity of decision thereon throughout the country.

3. In holding other portions of the contract sued upon to be invalid as against the public policy of the State of Illinois, the courts of Illinois deprived petitioner of due process of law, by applying to the contract the local public policy of the State of Illinois when the contract was executed in New York and performed in Tennessee. The questions involved were questions of general commercial and corporate law upon which the federal court was entitled to exercise its independent judgment, which judgment the said court was prevented from exercising herein by the improper assumption by the Probate Court of Illinois of sole and exclusive jurisdiction in the matter. While petitioner was compelled to invoke the jurisdiction of the Probate Court of the State of Illinois at the risk of construing the laws and interpreting the decisions of the State of Illinois, he did not voluntarily surrender or waive his right to have the contract construed and interpreted by the U. S. District Court, a court of competent jurisdiction, in which a prior suit was then and is now still pending undetermined. Even if the Probate Court of Illinois had had

jurisdiction of the cause (which was not the fact) it was error to apply the local public policy of the State of Illinois to a contract executed in New York and performed in Tennessee. On the contrary the Illinois Courts did not attempt to determine whether the contract violated the public policy of the two states concerned, to wit: the State of New York and the State of Tennessee. On well-settled principles the application by the Illinois courts of the local public policy of the State of Illinois, under the circumstances of this case, constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The matter in dispute presently involves a substantial property right of petitioner to upwards of 10,000 shares of the common stock of Tennessee Gas Transmission Company, additional shares of stock increments having accrued since the commencement of suit herein, the present value of which shares of stock is in excess of $300,000.00. It is respectfully submitted that petitioner has been illegally circumscribed in his attempt to recover upon the written contract for the delivery to him of such shares, by the unwarranted assumption by the Probate Court of Illinois of jurisdiction in a matter where it had no jurisdiction, by the unwarranted exclusion from jurisdiction of the U. S. District Court, by the unwarranted application to the contract of the local public policy of the State of Illinois, not at all applicable thereto, by the incorrect interpretation by the courts of Illinois of a federal statute not heretofore construed by any court in the United States, and by the attempt of the courts of Illinois to draw to their forum control over the obligations of a contract validly consummated in New York and performed in Tennessee, the

nature of such contract being such as not to be so repugnant to the vital interests of the State of Illinois as to justify the refusal to enforce the same.

WHEREFORE, petitioner respectfully prays that this petition be granted.

CURTIS B. DALL,
Petitioner.

By ALEXANDER KAHAN,
Attorney for Petitioner.

Of Counsel:
JOHN J. O'CONNOR,
HARRY J. PASTERNAK.

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Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Appellate Court of Illinois, First District (fols. 31-41), filed on November 21, 1949, is reported in Advance Sheet No. 2 of 339 Illinois Appellate Court Reports, at page 113.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3).

Statement of the Case.

The facts have been set forth in the foregoing petition.

Specification of Errors.

It is respectfully submitted that the courts of the State of Illinois erred:

(1) in determining that the Probate Court of Illinois had jurisdiction of the subject matter of this litigation to the exclusion of the U. S. District Court for the Northern District of Illinois, Eastern Division;

(2) in determining that the contract herein sued upon violated the Federal Natural Gas Act;

(3) in applying the local public policy of the State of Illinois to the contract herein sued upon, which contract was executed in the State of New York and performed in the State of Tennessee;

(4) in depriving the petitioner of the guarantees assured to him by the Fourteenth Amendment to the Constitution of the United States by virtue of the foregoing.

SUMMARY OF ARGUMENT.

POINT I.

Usurpation by the Probate Court of Illinois of jurisdiction which it did not have, to the exclusion of the Federal Court in which a prior action was pending, violated petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

POINT II.

The Courts of Illinois misconstrued the meaning and intent of the Federal Natural Gas Act in holding that the contract violated the provisions of that Act.

POINT III.

The Illinois Courts erroneously applied the public policy of Illinois to a matter of general commercial law under a contract executed in New York and performed in Tennessee, thereby violating, under well-settled principles, petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

POINT I.

Usurpation by the Probate Court of Illinois of jurisdiction which it did not have, to the exclusion of the Federal Court in which a prior action was pending, violated petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

Petitioner's suit was in equity for an accounting and recovery of specific shares of stock claimed by him under a joint-venture written agreement (fols. 10-15). That suit was initially brought in the U. S. District Court for the Northern District of Illinois, Eastern Division (fol. 61). Solely because of the possible application of the Illinois statute of limitations against claims in Illinois against estates of deceased persons, did petitioner thereafter file his claim in the Probate Court of Illinois. Petitioner was not a resident of Illinois at any time. Petitioner duly objected, in the Probate Court of Illinois, to the jurisdiction of that court.

The statutes and reported decisions in Illinois clearly demonstrate that the Probate Court of Illinois had no jurisdiction of the subject matter of petitioner's claim.

Under Illinois law the Probate Court did not have general jurisdiction to hear and adjudicate all claims that might be made against the estate of a decedent. A substantial volume of such claims was excluded from its jurisdiction. In *Howard* v. *Swift,* 356 Ill. 80, 84, the Court said:

> "The jurisdiction of the probate court is defined and restricted by Section 20 of Article 6 of the State Constitution. So far as applicable to this case, section 20 provided: 'Said courts, when established, shall have original jurisdiction of all probate mat-

> ters, the settlement of estates of deceased persons,' etc. The Probate Court, by virtue of the constitution, is therefore not a court of general jurisdiction, but its jurisdiction is circumscribed and restrained by the constitution. Any legislative acts which attempt to extend such jurisdiction beyond that conferred by the constitution are violative of the constitution. Such court has no general equitable jurisdiction but can only exercise equitable power within the zone conferred by the constitution."

The equity jurisdiction of the Probate Court of the State of Illinois is limited to cases where the relief sought is "a money claim, equitable in its nature."

> *Moore* v. *Rogers,* 19 Ill. 347;
> *Dixon* v. *Buell,* 21 Ill. 203;
> *Hurd* v. *Slaten,* 43 Ill. 348;
> *People* v. *Harrison,* 82 Ill. 84;
> *Estate of Ramsey* v. *Whitbeck,* 183 Ill. 550;
> *Henry* v. *Caruthers,* 196 Ill. 138;
> *Trego* v. *Cunningham's Estate,* 267 Ill. 367;
> *Foreman Tr. & Sav. Bank* v. *Tauber,* 348 Ill. 280.

As said in Horner, Probate Practice, Volume I, Section 396:

> "There are limitations, however, to this jurisdiction of the Probate Court over claims of an equitable nature. * * * It is perhaps safe to say further, that the *claim should be for money due from the deceased,* and for which were the deceased alive, a judgment at law or a money decree in equity could be obtained. * * *"

The subject case is not "a money claim, equitable in its nature." It is for an accounting between joint venturers, for the settlement of their rights in specific property—

capital stock of a corporation—and for the specific performance of the provision in their joint venture contract providing that said stock be divided on a 50/50 basis.

Since the filing of the subject case in the Probate Court, the question of the jurisdiction of that court to try litigation instituted by third-party claimants against a deceased estate for the recovery of specific property has twice been adjudicated by the Illinois courts of appeal. In *Estate of Quick,* 33 Ill. App. 573, a third-party claimant filed a petition in the Probate Court to recover certain securities claimed to be owned by petitioner and an order was entered thereon directing the administrator to turn the stock over to petitioner. Subsequently, a citation was sued out by decedent's widow to compel return of the stock to the estate and the Appellate Court of Illinois for the Fourth District, held that the Probate Court had no jurisdiction to enter the order directing the estate to turn over the stock to the third-party claimant. The Court said:

> "The petition filed by respondent, Rachel Quick, was to determine the ownership of the stock and the order of September 29, 1944 of the Probate Court found the stock to be her property. The court ordered the administrator to deliver the same to the respondent. The Probate Court determined the title to personal estate held by the administrator as an asset of the estate upon petition of an adverse claimant to the estate. In our opinion the Probate Court did not have the authority to do this and its act in this respect was beyond the jurisdiction of the court. • • •
>
> "In order for the Probate Court to have jurisdiction of the proceedings of the respondent to determine the ownership of the stock in controversy here, there must be some authority granted by statute authorizing such a proceeding. *(Morgan* v. *Hoyt,* 69 Ill. 489; *Newell* v. *Montgomery,* 129 Ill. 58; *Kingsbury* v. *Powers,* 131 Ill. 182, at page 194; *In re Mil-*

ler's Estate (Johnson v. *Miller),* 311 Ill. App. 280.) There is no statute authorizing the Probate Court to enter the order of September 29, 1944, and we consider said order to be null and void since the court had no jurisdiction over the subject matter here."

In re Estate of George, 335 Ill. App. 509, involved a petition by a third-party claimant filed against an administrator to recover certain chattels claimed to have been conveyed by decedent to petitioner during decedent's lifetime. The Appellate Court of Illinois for the First District (the very court which wrote the only formal opinion in the instant case) held:

"Probate Courts have a limited jurisdiction. Horner Probate Practice, Consolidated, 4th Ed., Vol. 1, Secs. 22-24. The purpose of administration of decedent's estate is: 1. To collect the assets and pay the debts, expenses, etc.; and 2. To distribute the net assets among those entitled thereto. 21 Amer. Jur. 377. In aid of the first purpose the Illinois Probate Act provides for citations to recover property for the estate. Article XV, Chap. 3, Ill. Rev. Stats. (Jones Ill. Stats. Ann. 110.432, *et seq.).* This is not a proceeding for a citation. It is for the recovery of specific personal property from the administrator. Also, in aid of the administrative purpose, the Probate Act provides fully for adjudication of claims against estates, Article XVIII (Ill. Rev. Stat. 1947, ch. 3, par. 344; Jones Ill. Stats. Ann. 110.441, *et seq.).*

(3) The Probate Court has not jurisdiction against all claims against an estate of its administrator. Horner Probate Practice, Vol. I, Sec. 383. It is clear from a reading of Article XVII of the Probate Act that the instant proceeding does not fall within any classification made in that Article of claims against

estates. It is plain that the Article contemplates monetary claims to be paid, if allowed, in due course of administration.

(4) The instant claim is not a monetary claim. If allowed, it could not be paid. It seeks specific property. The claim is adverse to the claim of title by decedent's personal representative. Plaintiff does not seek through the estate but against it. *Schmitt* v. *Jacques,* 26 Tex. Civ. App. 125, 62 S. W. 956. It is not based on alleged misconduct of decedent during her lifetime, but upon the conduct of defendant after decedent's death. *Oliver* v. *Crook,* 321 Ill. App. 55, p. 71. Plaintiff's action should not have been presented in the Probate Court. It should have been the subject of an independent suit. *Oliver* v. *Crook; Schmitt* v. *Jacques; Barlow* v. *Anglin,* 45 S. W. (Tex.) 857; *Watts* v. *Lawrence,* 26 Wyo. 367, 185 Pac. 719.

It is our opinion that the Probate Court had no jurisdiction of the claim in the first instance and that the Circuit Court was without jurisdiction to consider the appeal."

Leave to appeal from the foregoing decision was denied by the Supreme Court of Illinois (336 Ill. App. xv).

On August 2nd, 1949, more than 1½ years after the entry of judgment herein by the Probate Court of Illinois, the Legislature of the State of Illinois, in attempting to cure the lack of jurisdiction in the Probate Court exemplified by the cases cited, adopted an amendment purporting to give the Probate Court such jurisdiction (Chap. 3, Sec. 339 (a) Ill. Rev. Stats. 1949). The very enactment of this amendment constitutes a recognition of the prior lack of jurisdiction of the Probate Court in the instant case, which was decided in the Probate Court long before such action by the Legislature. This enactment is of doubtful validity in view of the language of the court in *Howard* v. *Swift,*

356 Ill. 80, 84, in which the Supreme Court of Illinois stated that the Legislature was without power to extend the jurisdiction of the Probate Court beyond constitutional limits. The Probate Court did not have jurisdiction of this action prior to the enactment in question, and such enactment did not purport to and could not operate retroactively to confer such jurisdiction.

The general principle that Federal Courts will usually follow decisions of state courts as to jurisdiction of state courts is subject to exceptions. In the instant case, the Probate Court of Illinois completely lacked any color of jurisdiction; its usurpation of the earlier acquired jurisdiction of the U. S. District Court was contrary, not only to the constitution of the State of Illinois, the statutes of that state, and the prior decisions of the courts of that state, but the laws and the Constitution of the United States. Its determination was therefore a nullity, and petitioner has never had his day in court, but petitioner is nevertheless confronted with a judgment against him, affirmed by the appellate courts of Illinois.

In *Wight* v. *Police Jury*, 264 Fed. 705, 709, commenting on the general rule, the court said:

> "There are important exceptions. Where state decisions have been followed under conditions making them rules of property rights, changes in the decisions may substantially constitute the taking of property without due process of law, in which event the courts of the United States may feel obliged to adhere, with reference to rights arising prior to the change, to the old rulings. In those cases in which the effect of the state decisions is in doubt, the federal court may be under the necessity of making a decision without reference to expression from the state court. Where unequivocal dicta are in conflict with prior unequivocal decisions, no definite rule defines the duty of the federal court."

In the instant case, the decision of the Probate Court, as affirmed, is contrary to prior decisions of the same courts in the same state. In view of the substantial property rights involved and the usurpation of jurisdiction by the Probate Court, to the exclusion of the Federal Court, in which a prior action was then pending, and in further view of the substantial federal questions involved, in addition to that of jurisdiction of the Probate Court, this Court should, it is respectfully submitted, review the action of the Probate Court, as affirmed by the appellate courts of Illinois.

POINT II.

The Courts of Illinois misconstrued the meaning and intent of the Federal Natural Gas Act in holding that the contract violated the provisions of that Act.

The contract sued upon provided, in part, as follows:

> "4: It is agreed between us that in some suitable and legal way for a nominal cash consideration, I am to acquire from you not less than 27,000 shares of the 'A' Corporation's common stock. This amount of stock is to be due me and arranged for at the time the original financing of the 'B' Company is arranged for. It is further agreed between us that as a result of our joint efforts, if we can save 90,000 shares of the 'A' Corporation's common stock in connection with the raising of $75,000.00 of a $150,000.00 program, that you and I are to personally share on a fifty-fifty basis said 90,000 shares or any part thereof which we may be able to save and which stock shall accrue to us in some legal manner with a nominal consideration to meet with any existing laws of the State of Tennessee."

It is not disputed that the corporation to be organized under that contract was intended ultimately to be a natural gas company (fol. 1); nor can it be disputed that at the time the contract was executed and performed the company was not engaged in transporting or selling natural gas in interstate commerce.

The question determined by the state courts of Illinois was whether, under section 717k of Title 15, U. S. C. A. (Natural Gas Act), petitioner was forbidden to receive such stock in view of the fact that he was an officer of the corporation.

Sec. 717k provides, in part, as follows:

> "It shall be unlawful for an officer or director of any natural-gas company to receive for his own benefit, directly or indirectly, any money or thing of value in respect to the negotiation, hypothecation, or sale by such natural-gas company of any security issued, or to be issued, by such natural-gas company, or to share in any of the proceeds thereof."

Sec. 717a, Title 15, U. S. C. A., defines a "natural gas company" as that term is used in the Act, as follows:

> "(6) 'Natural gas company' means a person *engaged* in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale" (italics supplied).

In view of the fact that the corporation involved was not engaged in the transportation or sale of natural gas either at the time the contract was executed or at the time it was performed, the Natural Gas Act had no application to the contract. The contrary determination by the courts of Illinois is a misconstruction and misconception not only of the words but of the intent of Congress.

The Natural Gas Act (Ch. 15 B, U. S. C. A.) was first adopted on June 21, 1938, as Chapter 556, Sec. 1, 52 Stat.

821. It provided then and still does provide in part as follows:

> "(a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> (b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to *natural-gas companies engaged in such transportation or sale,* but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the production or gathering of natural gas." (Italics supplied.) (U. S. C. A. Title 15, sec. 717.)

This introductory portion of the Act sets the pattern for the entire law. Throughout the Act, reference is made solely to "natural gas companies" as subject to its provisions. See for example:

> Sec. 717c(a) "All rates and charges made, demanded or received by any *natural-gas company* for * * *"
>
> Sec. 717c(b) "No *natural-gas company shall* * * *"
>
> Sec. 717c(d) "* * * no change shall be made by any *natural-gas company* * * *"
>
> Sec. 717e(a) "The Commission may investigate and ascertain the actual cost of the property of every *natural-gas company* * * *"

Sec. 717e(b) "Every *natural-gas company* * * *"

Sec. 717f(b) "No *natural-gas company* shall * * *"

Sec. 717g(a) "Every *natural-gas company* shall * * *" (italics supplied).

It is clearly evidenced by that pattern and by the above-quoted definition of a natural-gas company that the Act was intended to apply only to companies actually engaged in the transportation or sale of natural gas as distinguished from those intending to so engage.

At the time the contract sued on was executed, the contemplated corporation had not even been formed. At the time the contract was performed the corporation had neither procured a Certificate of Convenience and Necessity nor had it constructed a pipeline. Unquestionably then, it was not and could not be engaged in the interstate transportation or sale of natural gas. It could not engage in such activity until it procured a Certificate of Convenience and Necessity and constructed a pipe line.

In *In re Toledo Portland Cement Co.*, 156 Fed. 83, 87, the Court held that a corporation was not subject to the provisions of the Bankruptcy Act because it was not "engaged" in any mercantile business. The Court appropriately stated:

> "It seems clear that if Congress meant to make corporations incorporated for the conduct of any of the lines of business mentioned in section 4 of the Act subject to adjudication as involuntary bankrupts, before they began the business for which they were created, the most natural expression of that intent would have been the phrase *'incorporated for'*, or *'organized for* manufacturing or mercantile pursuits.' Either would have demonstrated an unmistakable purpose to bring them within the scope of the Act immediately upon incorporation or organization." (Italics supplied.)

In *Llewellyn* v. *Pittsburgh*, 222 Fed. 177, 185, in determining whether the defendant corporation was "engaged in business" within the meaning of a special excise tax provision, the Court, in holding that it was not, stated:

> "In acquiring property and in constructing railroads they doubtless engaged in business transactions under authority of their corporative powers, but not until they had acquired property and constructed their railroads can they be said to have engaged in and carried on the business for which they were primarily organized."

In *United States* v. *Emery*, 237 U. S. 28, 32, the Court said, in connection with the meaning of the word "engaged":

> "The question is rather what the corporation is doing than what it could do."

See also:

Cannon v. *Elk Creek Lumber Co.*, 8 Fed. (2) 996 (C. C. A. 7th);
Gillman v. *The State*, 55 Ala. 248;
State Corporation Commission v. *Old Abe Co.*, 43 N. M. 367, 94 Pac. (2) 105;
Friedlander Bros. v. *Deal*, 218 Ala. 245, 118 So. 508;
Fink Coal & Coke Co. v. *Heiner*, 26 Fed. (2) 136;
Lane Timber Co. v. *Hynson*, 4 Fed. (2) 666.

The same has been held under the Federal Employers Liability Act.

Hiser v. *Davis*, 234 N. Y. 300, 137 N. E. 596;
Quirk v. *Erie*, 235 N. Y. 405, 139 N. E. 556;

Grovio v. *N. Y. Central R. R.*, 162 N. Y. Supp. 1026;

Carr v. *N. Y. C. & N. H. R. R. Co.*, 136 N. Y. Supp. 501.

Also see collection of cases under Federal Fair Labor Standards Act, 29 U. S. C. A. at page 203, *et seq.*

The Federal Natural Gas Act, applying only to companies actually engaged in the interstate transportation or sale of natural gas, was in force on March 5, 1940, when the contract sued on was entered into and in May and August, 1940, when the shares of common stock which are the subject of this litigation were authorized and issued to the decedent.

The Act was amended on February 7, 1942, and for the first time was given a prospective application for a very limited purpose. Section 717f(c), relating to the construction of natural gas facilities, as amended by Act of February 7, 1942, now uses the language "natural gas company *or person which will be a natural gas company upon completion of any proposed construction* * * *." (Italics supplied.)

If the entire Act were intended to apply to companies organized to engage or contemplating engaging in the interstate transportation or sale of natural gas, as determined by the Illinois courts, the italicized words quoted above, added by this amendment, would be completely redundant. Yet Congress added those words by special amendment after a report by the Congressional Committee on Interstate and Foreign Commerce, finding that the Act did not apply to companies contemplating engaging in interstate transportation or sale of natural gas.

In advising the adoption of this amendment, the Congressional Committee recognized and reported to Congress

(p. 187, U. S. Code Congressional Service, 77th Congress—Second Session, 1942) that the Act applied only to those engaged in transportation or sale of natural gas in interstate commerce, and not to those who intended to engage therein. It recognized and reported to Congress that pipe lines could be constructed without supervision by the Federal Power Commission, and recommended that the coverage of the Act be extended to those intending to engage in the natural gas business, *but only to the extent of supervision over construction of proposed pipe lines.* If the coverage of the Act were as determined by the Illinois courts, then the Committee and Congress labored mightily but in vain.

In its report to the Congress, the Committee said:

> "Such a natural gas pipe line, *as soon as it is constructed,* it should be noted, comes within the Commission's jurisdiction and is subject to regulation as a facility used for the transportation of natural gas in interstate commerce. Obviously adequate regulation of such pipe lines when constructed requires that the Commission also have jurisdiction to regulate construction and initial financing. By the unregulated construction of a pipe line, uneconomic construction, or inflated costs may make proper regulation of operation thereafter difficult or practically impossible. The bill when enacted will have the effect of giving the commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand. *Without such authority, the commission may find itself confronted with a situation where it must either accept conditions which appear undesir-*

> *able in the public interest, or require, subsequent to construction, changes which may have much more serious practical consequences than they would have had if they had been made before the public* was asked to finance the enterprise." (P. 187 U. S. Code Congressional Service, 77th Congress—Second Session, 1942). (Italics supplied.)

This statement, made in 1942 by a Congressional Committee of the House of Representatives, conclusively establishes that the Natural Gas Act was not intended to apply and does not apply until a corporation actually engaged in the transportation or sale of natural gas in interstate commerce, or under the 1942 amendment, until it commenced construction of natural gas facilities.

When the contract sued on was executed and performed, Tennessee Gas & Transmission Company was not, and had not, engaged in either of these activities and was, therefore, not a Natural Gas Company within the provisions of the Act.

The determination of the Illinois courts that the Federal Natural Gas Act applies in its entirety to corporations contemplating engaging in the transportation or sale in interstate commerce of natural gas (fols. 34-37) is clearly erroneous. We may well speculate on the reasons why Congress drew the line as it did at the point of engaging in transportation or sale of natural gas. It is well known that corporate officers are most likely to be the persons who can raise funds for the embryonic venture. It may well be that until sufficient funds are raised to engage in the transportation or sale of natural gas, Congress desired that the officers of a corporation remain untrammelled, except as to normal rules of law, in their efforts to raise funds. It may also well be that the Congress felt it wiser to rely on the discretion of the Federal

Power Commission in passing on the corporate and financial structure of the applicant, when application is made for a certificate of convenience and necessity, than unduly to hamper the organization of new companies and the activities of those who must bear the burden of providing financing therefor.

In any event, it clearly appears that both the letter and the unequivocally expressed intent of the Federal Natural Gas Act are violated by the determination of the Illinois courts in this case.

To the best of counsel's knowledge, no other court has decided the question here involved. It is a question of broad public interest in a large and growing industry. Its determination by this court is a matter of substantial public interest.

POINT III.

The Illinois Courts erroneously applied the public policy of Illinois to a matter of general commercial law under a contract executed in New York and performed in Tennessee, thereby violating, under well-settled principles, petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

The extent to which the State of Illinois was involved herein is that the decedent Victor S. Johnson was a resident of Illinois. Petitioner was a resident of Texas. The contract was executed in New York. It was performed in Tennessee. In order to recover, petitioner had to sue. Since the decedent died a resident of Illinois, petitioner's only recourse was to sue in Illinois. Petitioner chose as his forum the U. S. District Court for the Northern District of Illinois, Eastern Division. He was forced into the Illinois Probate Court by the threat of a short statute of limita-

tions (9 months) in Illinois. The Probate Court of Illinois thereupon assumed exclusive jurisdiction of the litigation and dismissed the petition and claim on demurrer. This determination was affirmed by the appellate courts, and, in so affirming with opinion, the Appellate Court of Illinois, First District, held the contract invalid on the ground that it violated the Federal Natural Gas Act and the public policy of Illinois (fols. 34-41).

It is well-settled that the application by Illinois of its public policy to hold invalid a contract not executed or performed in Illinois is a violation of the due process clause of the Constitution of the United States.

> *Hartford Accident and Idemnity Co.* vs. *Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178.

In the case just cited, this court, in determining that refusal by the courts of Mississippi to enforce a short statute of limitations contained in a Kentucky contract of insurance affecting a defalcation occurring in Mississippi, violated the due process clause of the Federal Constitution, stated:

> "The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (Hooper *v.* California, 155 U. S. 648, 39 L. ed. 297, 15 S. Ct. 207, 5 Inters. Com. Rep. 610; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 565, 566, 43 L. ed. 552, 555, 556, 19 S. Ct. 281; New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 398, 399, 44 L. ed. 1116, 1123, 1124, 20 S. Ct. 962); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. New York L. Ins. Co. *v.* Head, 234 U. S. 149, 58 L. ed. 1259, 34 S. Ct. 879; AEtna L. Ins. Co. *v.* Dunken, 266 U. S. 389, 399, 69 L. ed. 342, 349, 45 S. Ct. 129. Nor may it in an action

based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Ins. Co. *v.* Dick, 281 U. S. 397, 407, 408, 74 L. ed. 926, 933, 934, 50 S. Ct. 388, 74 A. L. R. 701."

It further stated:

"The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (Home Ins. Co. *v.* Dick, *supra,* (281 U. S. 408, 74 L. ed. 933, 50 S. Ct. 338, 74 A. L. R. 701)), it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection which the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. Ætna L. Ins. Co. *v.* Dunken, 266 U. S. 389, 69 L. ed. 342, 45 S. Ct. 129, *supra;* Home Ins. Co. *v.* Dick, *supra.* Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. Compare Bond

v. Hume, 243 U. S. 15, 22, 61 L. ed. 565, 568, 37 S. Ct. 366. But clearly this is not such a case."

Nor is there anything in the contract herein sued upon fols. 10-15) which can justifiably be said to be "so repugnant" to the vital interests of the state of Illinois as to justify refusal of the Illinois courts to enforce the contract, as examination of the contract will disclose.

In *Citizens Nat. Bank of Orange, Va.* v. *Waugh,* 78 F (2d) 325, the Circuit Court of Appeals, Fourth Circuit, in refusing to apply state law holding invalid a provision in a note for payment of attorneys' fees on collection thereof, also held that the law of the state where the contract is made and executed prevails, not the law of the forum. It pointed out that a state may refuse to recognize a foreign contract only if repugnant to good morals, if enforcement would lead to disorganization of local municipal law or if the contract affects local property rights of persons domiciled within the state.

None of these conditions is present in the case before this court. Under such circumstances, the Federal Courts will protect the rights of the non-resident under the Federal Constitution.

> "And the rule is not avoided by the declaration of a state court that its decision is grounded in public policy; for it is equally well settled that in matters of general law the federal courts determine such matters of general law for themselves in deciding whether a contract is contrary thereto" (Citizens Nat. Bank of Orange, Va. *v.* Waugh, 78 F (2d) 325, 328).

As further stated by the court in that case:

> "One of the principal purposes of the creation of the federal courts was to establish impartial tribunals

which would not be subject to local influences; and, if this purpose is to be attained, they must be allowed to exercise an independent judgment on the law as well as on the facts of the cases before them" (at p. 334).

To the same effect, see:

Home Ins. Co. v. *Dick,* 281 U. S. 397, 74 L. Ed. 926;
Griffin v. *McCoach,* 313 U. S. 498, 85 L. Ed. 1481.

The Illinois courts did not attempt to apply the law of New York, where the contract was executed, or the law of Tennessee, where the contract was performed. It held against public policy normal, every-day provisions of corporate contracts (fols. 37-41), and indulged in assumptions not warranted by the facts before it. The result is that a foreign contract, valid where made and valid where executed, now stands condemned as invalid in the courts of a state which had no reasonable connection with or control over the contract, with no opportunity afforded petitioner for a trial in a court of competent jurisdiction.

Conclusion.

A writ of certiorari should be granted.

Dated, New York, June 6, 1950.

Respectfully submitted,

ALEXANDER KAHAN,
Attorney for Petitioner.

Of Counsel:

JOHN J. O'CONNOR,
HARRY J. PASTERNAK.

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JUL 10 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 115

CURTIS B. DALL,

Petitioner,

vs.

VICTOR S. JOHNSON, JR., ADMINISTRATOR DE BONIS NON OF THE ESTATE OF VICTOR S. JOHNSON, DECEASED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR RESPONDENT IN OPPOSITION.

W. H. F. MILLAR,
EGBERT ROBERTSON,
EDMUND L. McGIBBON,
134 South La Salle Street,
Chicago, Ill.,
Attorneys for Respondent.

THE BLAKELY-WARREN PRINTING COMPANY, 230 WEST JACKSON, CHICAGO

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Appellate Court of Illinois, First District, filed on November 21, 1949, is reported at 339 Illinois Appellate Court Reports, at page 110, and at 88 N. E. (2d) 886, and is reproduced in the Transcript of Record at pages 17-25. The order of the Supreme Court of Illinois denying leave to appeal (without opinion) appears at Transcript of Record pages 114-115).

JURISDICTION.

The petition for the writ of certiorari fails to show any ground for the exercise of jurisdiction by this Court. Petitioner's jurisdictional statement assigns as the basis of jurisdiction Section 1257(3) of Title 28, U. S. Code. The only relevant clause of this section is as follows:

> "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

No title, right, privilege or immunity is claimed under any treaty or commission or authority.

The only federal statute involved in any way is the Federal Natural Gas Act, and petitioner makes no claim that he was denied any title, right, privilege or immunity thereunder, but on the contrary contends that the Act has no application to him or the law suit. His claims are not by virtue of a federal statute but upon an alleged private contract. (*Conde* v. *York,* 168 U. S. 642, 648-651; *Walworth* v. *Kneeland,* 15 How. 348, 353-354.)

The gist of his jurisdictional claim is the alleged violation of his rights under the Fourteenth Amendment to the Federal Constitution by the action of the Illinois courts in taking jurisdiction of the claim he filed in such courts, which he asserts amounted to a deprivation of due process of law and a denial of his right to equal protection of the laws.

The record shows that nowhere in the proceeding in any of the Illinois courts did the plaintiff make any reference to these constitutional rights or assert any claim that any of them had been violated. We believe the law is well settled that in order to be available in this Court the claim of con-

stitutional right must have been asserted in the court below and denied, either expressly or impliedly. Such denial must be of a right or claim which had in some manner been brought to the attention of the court below. "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it." (*Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626, 633-635; *Thomas* v. *Iowa,* 209 U. S. 258, 262-263; *Hartford Life Insurance Co.* v. *Johnson,* 249 U. S. 490, 493; *C. I. O.* v. *McAdory,* 325 U. S. 472, 477.)

Even if we assume, contrary to the fact, that this question had been raised in the Circuit Court, it was waived and its availability in this proceeding lost when the plaintiff appealed to the Appellate Court instead of the Supreme Court of Illinois. The Illinois courts have held that in view of Section 75 of the Illinois Practice Act (Smith-Hurd Illinois Annotated Statutes, Chap. 110, Sec. 199), which provides for appeal to the Supreme Court in all cases in which the construction of the Constitution is involved, an appeal to an Appellate Court waives any constitutional questions. (*People* v. *Terrill,* 362 Ill. 61, 199 N. E. 97; *People* v. *Rosenthal,* 370 Ill. 244, 18 N. E. (2d) 450; *People* v. *Richardson,* 397 Ill. 84, 72 N. E. (2d) 851; and *People* v. *Parker,* 396 Ill. 583, 72 N. E. (2d) 848.) This Court has held that such an appeal in Illinois waives all rights under the Federal Constitution as well as those under the Illinois Constitution, and that the rule is reasonable and fair, and will be followed in this Court. (*Central Union Telephone Co.* v. *City of Edwardsville,* 269 U. S. 190, 194-195.) This decision was followed and approved in April, 1948, in *Parker* v. *Illinois,* 333 U. S. 571, 573-575.

Even if it were assumed that the interpretation of the Natural Gas Act involves a federal question reviewable here, it still affirmatively appears that the decision of the

Appellate Court of Illinois in this case was based upon a question of general law, namely, the violation of public policy in the plan of corporate organization stated in the contract sued upon. We believe it is further well settled law that where the judgment of the state court rests upon adequate and independent state grounds, the presence of a reviewable federal question will not induce this Court to take jurisdiction to review the decision of the state court. (*Herb* v. *Pitcairn*, 324 U. S. 117, 125-126; *Fox Film Corporation* v. *Muller*, 296 U. S. 207, 210.)

QUESTIONS PRESENTED.

1. Whether this Court will assume jurisdiction of a case where the only real claim of jurisdiction concerns constitutional provisions which have never been asserted in the State courts, and have been waived by the petitioner's appeal to the Appellate Court of Illinois, and where the decision of the Appellate Court of Illinois was based upon an adequate non-federal ground apart from any federal question.

2. Whether this Court will review the decision of the Supreme Court of Illinois declining to disturb the jurisdiction of the Probate Court of the claim which the plaintiff filed there, which was purely a question of Illinois law.

3. Whether, if this Court should ever reach the question, petitioner can now contend that the Probate Court had no jurisdiction of the case which he brought there, and whether as a matter of Illinois law the Probate Court did have such jurisdiction.

4. Whether this Court will consider the first of the "Questions Presented" by the petitioner that the Probate Court refused to permit petitioner to progress his prior

identical claim in the federal court, which statement is wholly contrary to the record and the fact, since no such action of the Probate Court ever occurred, or the claim of petitioner in the first of his "Questions Presented" that the judgment of the Probate Court "deprived petitioner of a trial in the federal court," since no action taken by the Probate Court did or could prevent the petitioner from proceeding with his suit in the federal court.

5. Whether this Court will give any consideration to the questions of conflict of laws stated in the fourth of petitioner's "Questions Presented," when such question has never before been raised anywhere in the proceeding, and if it had been raised would be determined by the law of the forum, and when the statement of it contains the unsupported assumption that the contract was executed in New York and performed in Tennessee, and the incorrect assertion that the obligations thereof were valid in New York and Tennessee.

STATUTE INVOLVED.

The statute involved is the Federal Natural Gas Act, adopted June 21, 1938 (15 U. S. C. A., Chap. 15B, Sections 717 to 717w) and particularly Section 717k. The validity of the statute is not involved, and the only question of interpretation involved is whether the definition of a natural gas company contained in Section 717, Subsection a, of the Act excludes from the prohibitions and the policy of the Act a corporation organized to be a natural gas company, but which has not yet received a certificate of convenience and necessity or commenced the actual transportation of gas in interstate commerce.

STATEMENT.

The "Summary Statement of the Matters Involved," at pages 4 to 6 of the petition, contains a number of erroneous statements not supported by the Record, among which are the following:

1. It is stated that the alleged contract of March 5, 1940, was executed in the State of New York. Exhibit A to the petition and claim (T. 7) is a purported contract letter addressed to Victor S. Johnson, in care of Brokaw, Dixon & McKee, at 120 Broadway, New York. Nothing in the record indicates where the purported contract was written or where it was accepted by Victor S. Johnson.

2. At page 5 of the Petition for the Writ of Certiorari, petitioner alleges that he "was then and is now" a resident of the State of Texas, and that the United States District Court suit had been commenced on the ground of diversity of citizenship. There is no information anywhere in the record concerning the Texas residence of petitioner, or the ground of jurisdiction of the suit in the United States District Court, the only reference to which is, at pages 6-7 of the Transcript, in paragraph 11 of the petition and claim filed in the Probate Court. The only information in the record concerning the residence of petitioner is the statement at page 8 of the Transcript of Record which refers to Mr. Dall as "myself of 70 Wall Street, New York City, and Nashville, Tennessee."

3. At page 5 of the petition, it is stated that on application of the respondent the Probate Court on June 5, 1947, issued an order determining that it alone had "sole jurisdiction" of petitioner's claim "despite the fact that respondent's motion to dismiss in the United States District Court was then pending undetermined." The Transcript

of Record shows no such order, and in fact no such order was ever entered. No objection was made by defendant to the jurisdiction of the Probate Court which the plaintiff had invoked by filing his petition there. The subject of the jurisdiction of the court was informally discussed and memoranda filed with respect to it. The only order of June 5, 1947, was an order of continuance. On June 11, 1947, an order was entered containing a formal recital that the court had jurisdiction of the parties and the subject matter, but nothing whatever as to "sole jurisdiction." The substance of this order was a direction as to the time for filing briefs on defendant's motion to dismiss on the ground of illegality of the contract. Thereafter the question of jurisdiction was never raised or discussed in the proceeding until the filing of plaintiff's petition for leave to appeal in the Supreme Court of Illinois.

4. At page 6 of the petition for writ of certiorari, petitioner states that the Circuit Court of Cook County, Illinois, "affirmed the order of the Probate Court without opinion." This is based upon a lack of information as to Illinois procedure. There is no such thing in Illinois as an affirmance or reversal by the Circuit Court of an order of the Probate Court. An appeal to the Circuit Court from an order of the Probate Court automatically vacates the judgment of the Probate Court, and the Circuit Court's jurisdiction is then to try the case *de novo* and enter such order as may be proper upon the merits as a *nisi prius* judgment. (*Schwartfager* v. *Schwartfager,* 330 Ill. App. 111, 113-114, 70 N. E. (2d) 216, 217.)

An orderly statement of the matters involved is as follows:

The Circuit Court of Cook County, on a trial *de novo* on appeal from the Probate Court, upon a motion, in the

nature of a demurrer, to dismiss the plaintiff's claim upon the face of the pleadings, entered its judgment order November 9, 1948 (T. 14), dismissing the plaintiff's petition and claim on the ground that the contract upon which the claim was founded was and is illegal, void and invalid, being against and contrary to public policy.

On appeal to the Appellate Court from this judgment, the Appellate Court affirmed the judgment (T. 25) on the grounds, as shown by its opinion (T. 17-25), that the contract upon which the claim was based was invalid (1) because it violated the provisions of Section 717k of the Natural Gas Act; (2) because the contract was in violation of the spirit of the Natural Gas Act and the public policy declared by it; and (3) because the contract violated public policy in its disregard of well established principles of law governing the obligations of corporate promoters and directors.

The Supreme Court of Illinois upon a petition for leave to appeal from the Appellate Court judgment denied the same (T. 114-115). The claimant in his petition for leave to appeal contended that the Probate Court had no jurisdiction of the proceeding which he had commenced in that court (T. 48-53).

Now in this Court, for the first time in the proceeding anywhere, he contends that the exercise by the Illinois courts of jurisdiction over the claim he filed there was in violation of his rights under the Fourteenth Amendment to the Federal Constitution.

ARGUMENT.

I.

The first point of petitioner's brief, at pages 14-20, is based upon an alleged "usurpation" by the Probate Court of Illinois of jurisdiction which it did not have, to the exclusion of the federal court, and a violation by this procedure of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

Aside from the question that the constitutional point has been waived for the reasons heretofore pointed out, and that the question of the jurisdiction of the Probate Court is a question of Illinois law, which was argued in the petition for leave to appeal to the Supreme Court of Illinois, which was denied, and that the exercise of jurisdiction by the Probate Court could not have excluded the jurisdiction of the federal court in Illinois, or "ousted" it, as petitioner says at page 7 of the petition, we think the law is rather clear, if this Court should ever reach the question, that the Probate Court had the jurisdiction which it exercised.

We shall not consume the Court's time here with a discussion of this question, but if the Court should deem it advisable to consider it, we suggest that the answer to the petition for leave to appeal in the Supreme Court of Illinois, shown at pages 97-114 of the Transcript of Record here, contains a full discussion of this jurisdiction and the right of the petitioner to raise this question in the Supreme Court of Illinois when he attempted to do so. As will very plainly appear from the cases cited in that answer in the Supreme Court of Illinois, the statement at page 7 of the petition for certiorari here that the decision of the State courts as to the jurisdiction of the Probate Court in the instant case "is contrary to all prior decisions in like cases

and constitutes *ex post facto* legislation by the judiciary" is simply an erroneous statement as to the prior Illinois decisions in like cases.

II.

The second point in petitioner's brief, appearing at pages 20-28, is devoted to an argument that the Illinois courts misconstrued the meaning and intent of the Federal Natural Gas Act.

In view of the jurisdictional questions heretofore discussed, and the plain and indisputable fact that the opinion of the Illinois Appellate Court turned, in addition to the Natural Gas Act question, upon an entirely separate and adequate non-federal ground, we doubt whether the Court will deem it necessary to consider the interpretation of the Natural Gas Act, and we do not feel justified in encroaching upon the Court's time to argue it more extensively here.

If, however, the Court deems it proper or desirable to consider this question, may we call the Court's attention to the fact that there are two questions under the Natural Gas Act, both decided by the Appellate Court, first, that the language of the contract sued upon provided for a violation of Section 717k of that Act, and, second, that the contract sued upon provided for a violation of the spirit of the Act and the public policy evidenced by it. Both of these questions were discussed extensively in our answer to the petition for leave to appeal in the Supreme Court of Illinois, which appears in the Transcript of Record. The discussion of the former point appears at pages 61-68 of the Transcript, and of the latter at pages 68-72 of the Transcript.

III.

The heading of petitioner's point III, at page 28 of his supporting brief, is based upon a claimed violation of petitioner's rights under the due process of law provision of the Fourteenth Amendment to the Federal Constitution. This has been waived for the reasons suggested in this brief under the heading of "Jurisdiction".

It also seems to us to involve fundamental misconceptions as to legal principles and misstatements of the record facts. Petitioner implies that Illinois had no connection with the matter excepting that the decedent Johnson lived there. But this fails to consider that a court of Illinois was where the plaintiff brought his action; Illinois was the state of the forum, and the public policy applicable was the public policy of the state where the court was sitting.

Petitioner's argument under the point includes numerous errors in factual statement. As has been pointed out in our Statement of Facts, there is no showing that petitioner was a resident of Texas, or that the alleged contract was executed in New York, nor is there any statement that the performance of the contract was in Tennessee, excepting as that may be inferred from the allegation that Tennessee Gas & Transmission Company was organized under the laws of that State, although it does not appear where the financial work in connection with this organization was to be done.

Then petitioner asserts that he was "forced into the Illinois Probate Court" by the threat of a short statute of limitations. We do not understand what the petitioner believes the legal effect of this to be. As a matter of law, if his suit in the federal court in Illinois was based upon diversity of citizenship, as he says, the Illinois statute of limitations was applicable there as well as in the proceeding in the Probate Court. (*Pufahl* v. *Estate of Parks*, 299 U. S.

217, 227-232, *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109-112, *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 537.)

But his next statement is wholly contrary to the fact. There is nothing whatever in the record or in the facts to justify a claim that the Probate Court "assumed exclusive jurisdiction," although it did exercise the jurisdiction which the plaintiff invoked. It seems plain that if both courts had jurisdiction the jurisdiction was concurrent, and plaintiff elected to proceed in the Probate Court.

The petitioner's primary basis for his contention in this section of his brief is based, we think, upon a complete misinterpretation and misapplication of the decision in the cited case of *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143. In that case a Mississippi corporation, doing business in Tennessee, filed its suit against a surety company, likewise doing business in Tennessee, upon a fidelity bond entered into in Tennessee and shown to be a Tennessee contract. This bond contained a limitation upon the bringing of suit thereon to a period of 15 months after the termination of the suretyship, and plaintiff made no claim within that time. After the time had run, the Delta Company brought suit in Mississippi. By a statute of Mississippi it was provided that limitations contained in such a contract as to the bringing of suit were declared to be void, if they were shorter than the statutory limitation period in Mississippi. The court held that the rights under the contract had vested in Tennessee, and that the plaintiff could not by bringing its action in Mississippi contend that the contract provision was invalid because of the Mississippi statute, and that Mississippi could not, without violating the due process provisions, give extra-territorial effect to its statute.

That this case decided only the federal constitutional question involved is apparent from the later history of the litigation. Upon reversal by this Court, the Supreme

Court of Mississippi sent the case back to the Circuit Court of Bolivar County, which again entered a judgment for the plaintiff upon the ground that under the law of Tennessee, which this Court had declared should be applied, the limitation in the contract was a condition precedent to the right of recovery rather than a condition subsequent barring the remedy, so that under the law of Tennessee the plaintiff would be entitled to recover. This decision was again appealed to the Supreme Court of Mississippi, and after a decision reversing the Circuit Court had been handed down by a division of that court, the case was again reviewed upon suggestion of error by the entire Supreme Court of Mississippi *in banc,* which affirmed the trial court in an opinion clarifying the relation between the state courts and this Court on the interpretation of the Tennessee law by the Mississippi court. (*Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.,* 189 Miss. 496, 195 So. 667.) From that decision an appeal was taken to this Court, which this Court dismissed for want of jurisdiction, but treated as a petition for writ of certiorari under Section 237(c) of the Judicial Code, and denied the petition (No. 189, 311 U. S. 610).

It seems apparent to us that this case is completely inapplicable to the one at bar. To apply it here, it must be presupposed that the contract sued upon has been shown to be valid and enforceable in the state where it was made. But nothing in the record shows where it was made, and if we assume it was made in New York, as petitioner says, it was just as invalid under the decisions in New York as under the law of Illinois. (*Manson* v. *Curtis,* 223 N. Y. 313, 119 N. E. 559; *McQuade* v. *Stoneham,* 263 N. Y. 223, 189 N. E. 235; *Gerdes, et al.* v. *Reynolds and Ballantine* v. *Ferretti,* 28 N. Y. Supp. (2d) 622-693, at page 680.)

Aside from the Natural Gas Act provisions, the public policy principles which the Appellate Court of Illinois sus-

tained are not primarily questions of local law in Illinois at all, but are quite general throughout the United States. The contract would have been equally invalid under the rule in Minnesota (*De La Motte* v. *Northwestern Clearance Co.*, 126 Minn. 197, 148 N. W. 47), and in Massachusetts (*Hellier* v. *Achorn, et al., Executors,* 151 N. E. 305). When the Federal courts were applying principles of general law according to their own interpretation of them rather than by following the rules of the states (before *Swift* v. *Tyson* had been changed by *Erie Railroad Co.* v. *Tompkins*), the principles enunciated by this Court would have invalidated this alleged contract upon public policy grounds just as Illinois has done. (*West* v. *Camden,* 135 U. S. 507.) Petitioner's complaint that he was forced to try the issue in an Illinois court rather than in a Federal court in Illinois is singularly lacking in relevancy (even if it were true), because a Federal court sitting in Illinois would have been required to apply the public policy of Illinois to this question. (*Griffin* v. *McCoach,* 313 U. S. 498, 506.)

But aside from all this, and beyond the fact that the question of conflict of laws now sought to be urged was not raised in any of the courts below, the later decisions of this Court have established that on such questions a Federal court sitting in a State will enforce the conflict of law rules of that State, and that a State may constitutionally decline to enforce in its courts, because contrary to its policy, a contract made in another State and valid where made. (*Griffin* v. *McCoach,* 313 U. S. 498, 503-507; *Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487.)

The extent and depth of petitioner's complete misunderstanding of the applicable law is exemplified in the lengthy quotation at pages 31 and 32 of the supporting brief from the case of *Citizens National Bank of Orange, Va.* v. *Waugh,* 78 F. (2d) 325. Of course an opinion of the Fourth Circuit Court of Appeals is not authoritative in this forum, but we

assume that petitioner's counsel have not been uncandid in the presentation and simply do not know that the doctrine of that case, and specifically that embodied in the quotation they reproduce in the brief, has been completely repudiated by this Court. The *Waugh* case is based squarely upon an extended approbatory comment on the rule of *Swift* v. *Tyson,* 16 Pet. 1, and the Fourth Circuit discussed and quoted from the famous case of *Black and White Taxi Cab & Transfer Co.* v. *Brown and Yellow Taxi Cab & Transfer Co.,* 276 U. S. 518 (familiarly known as the *Taxi Cab* case), in which this Court for the last time reaffirmed the doctrine of *Swift* v. *Tyson.* The dissent of Justices Holmes, Brandeis and Stone in the *Taxi Cab* case foreshadowed the final action of this court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, abandoning the doctrines of *Swift* v. *Tyson* and adopting the principle that in diversity cases there is no such thing as the exercise of independent judgment by the federal courts on questions of general common law. The underlying philosophy of *Erie Railroad* v. *Tompkins* was expounded and explained and the breadth of the change of view expressed in that case discussed at length in the opinion of Mr. Justice Frankfurter in *Guaranty Trust Co.* v. *York,* 326 U. S. 99.

Shortly after *Erie Railroad* v. *Tompkins,* the First Circuit Court of Appeals in *Sampson* v. *Channell,* 110 F. (2d) 754, interpreted that decision with respect to the respective functions of the state and federal courts in interpreting "general law" in substantially the way which this Court has since approved, and this Court on June 3, 1940, denied a petition for writ of certiorari in that case.

Petitioner's supporting brief follows the quotation from the *Waugh* case with a request that the court "to the same effect, see: *Home Insurance Co.* v. *Dick,* 281 U. S. 397, and *Griffin* v. *McCoach,* 313 U. S. 498." The obviousness of the reason why *Home Insurance Co.* v. *Dick* is wholly inappli-

cable lies in the statement at page 410 of the opinion that the Mexican Corporation there involved never was in Texas and "neither it nor the garnishees invoked the aid of the Texas courts or the Texas laws." But both *Home Insurance Co.* v. *Dick* and the *Delta & Pine Land* case, above discussed, were examples of exceptional situations, and both are distinguished in the opinion in *Griffin* v. *McCoach,* 313 U. S. 498, at page 507.

The latter case, so far from being "to the same effect," as petitioner's supporting brief says, is squarely in point in opposition to petitioner's contention, holding flatly (at page 503 of the opinion) that the conflict of laws rules of the courts of the states in which they sit are binding upon the federal courts, and that (at pages 506-7 of the opinion) the question of public policy of a contract made elsewhere is a question for the highest court of the state in which the suit is pending.

The result of an analysis of the authorities seems to us to establish the essential logical absurdity of the peroration at page 32 of petitioner's supporting brief, even though the factual statements therein, instead of being wholly fictitious, were supported by the record.

Conclusion.

The respondent respectfully submits that the petition for the writ of certiorari should be denied.

W. H. F. Millar,
Egbert Robertson,
Edmund L. McGibbon,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 115

CURTIS B. DALL,

Petitioner,

vs.

VICTOR S. JOHNSON, JR., Administrator *de bonis non* of the Estate of VICTOR S. JOHNSON, Deceased,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS

PETITIONER'S REPLY BRIEF

ALEXANDER KAHAN,
Attorney for Petitioner.

Of Counsel:

JOHN J. O'CONNOR,
HARRY J. PASTERNAK.

New York September 15, 1950.

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PETITIONER'S REPLY BRIEF

Correction

In petitioner's main brief, at page 16, the case of Estate of Quick was erroneously cited. The correct citation is 333 Ill. App. 573.

On the record, the contract in suit was a New York Contract

In an attempted reply to petitioner's point III, to wit: that the Illinois Courts violated petitioner's constitutional rights by applying local Illinois law to a contract executed in New York, respondent's brief states that "nothing in the record indicates where the purported contract was written or where it was accepted by Victor S. Johnson" (p. 6 respondent's brief). This assertion is a carefully calculated evasion of the facts.

The contract, dated March 5, 1940, is on the letterhead of Curtis B. Dall Corp., 70 Wall Street, New York, and and is addressed to Victor S. Johnson, c/o Brokaw, Dixon & McKee, 120 Broadway, New York. It also bears the approval of A. Faisin Dixon, of that firm, in addition to the signatures of petitioner and Victor S. Johnson, respondent's decedent.

A copy of the original contract is annexed to this brief and marked Exhibit "A", in view of the fact that petitioner's original claim contained a copy of the contract without the letterhead designation.

On the basis of the foregoing facts alone, a presumption arises that a contract written in New York and addressed to the addressee in New York was actually executed in New York, particularly in the absence of any circumstances to the contrary. The contract specifically provides for its performance in Nashville, Tennessee (fols. 10-11, and paragraph 2nd, Ex. A this brief). Nowhere is the State of Illinois mentioned or in anyway involved in the contract.

Unfortunately, when petitioner filed his original claim, after the death of Victor S. Johnson, nobody could foresee that respondent herein would seek to evade the just obligations of his decedent, Johnson, who is herein represented by the respondent; nor could anybody foresee that such evasion would be attempted by raising the issue of alleged illegality of the contract. Nor could anybody foresee that the Illinois State courts would dismiss the claim on motion, without trial and without the opportunity to petitioner to present all the facts, including the place of execution of the contract. In fact, prior to the death of respondent's decedent, said decedent delivered to petitioner part of the shares due under said contract (fols. 7-8), so that petitioner had no reason to believe that his claim under the contract would be opposed on the grounds of alleged illegality.

Accordingly, the original petition contains no allegation as to the place of execution or performance of the contract or as to the letterhead on which the contract was written. Nevertheless, it is submitted, that at the least the Illinois courts were on notice that the contract was not an Illinois contract, and they should have inquired where the contract was executed, and, if necessary, should have taken proof concerning this vital fact.

Petitioner was never a resident of the State of Illinois

Respondent also raises the issue of petitioner's residence (p. 6 respondent's brief) by pointing to alleged conflicting statements concerning this matter. One fact is clear however, even from respondent's brief. At no time was petitioner a resident of Illinois. He was at various times a resident of New York, Tennessee, Maryland and Texas, but never of the State of Illinois. In short the only act contemplated in the State of Illinois was a demand there, if necessary, upon respondent's decedent to deliver the balance of the securities due him after petitioner had performed under the terms of the contract in suit and after respondent's deceased had partially performed under said contract. Under those circumstances, as demonstrated in petitioner's main brief (pp. 28-32), the Illinois courts violated petitioner's constitutional rights under the due process clause of the Constitution of the United States by applying local public policy to a contract executed in New York and performed elsewhere than in Illinois. (*Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 78 L. ed. 1178.)

This Court has jurisdiction to grant the writ of certiorari requested by petitioner

Respondent asserts that this Court does not have jurisdiction to grant certiorari (pp. 2-3, Respondent's Brief). The contention is made that the constitutional question

was not properly raised, because under Illinois practice a constitutional question must be taken directly to the Illinois Supreme Court rather than to the Illinois Appellate Court.

This argument involves a basic misconception by respondent as to the origin of the constitutional question. The denial of due process in this case was brought about through the action of the Illinois Courts and specifically by the Illinois Appellate Court which failed to consider and apply the New York law governing the validity of the contract. In situations of this kind this Court regards the denial of due process as having been brought about through the State court action. Under such circumstances this Court holds that the raising of the constitutional point is timely if made after the action of the State courts has resulted in the denial of due process.

In *Saunders* v. *Shaw*, 244 U. S. 317, 320, 61 L. ed. 1163, the action of the State Supreme Court had given rise to a constitutional question not previously urged. Mr. Justice Holmes wrote:

> "Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court (referring to the State Supreme Court), done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or take other precaution in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation." (at p. 320)

(See also *Brinkerhoff-Faus Co.* v. *Hiller*, 281 U. S. 673, 682, 74 L. ed. 1107; *Missouri* v. *Gehner*, 281 U. S. 276, 320, 74 L. ed. 854; *Great Northern Railroad Co.* v. *Sunburst*, 287 U. S. 358, 367, 77 L. ed. 360.)

Since the action of the Illinois Appellate Court in this case itself constituted the denial of due process, the constitutional question did not arise until after the action of the Illinois Appellate Court.

Under New York law, which should have been applied by the courts of Illinois, petitioner is entitled to recover under the contract in suit

Respondent also urges that even under the New York law the contract in suit would have been held illegal. This contention is not only contrary to the fact but is also an attempt to prejudge the state of the New York law without a determination by a court of competent jurisdiction. Nor is it true that the Illinois State courts attempted to apply the laws of the State of New York, an unwarranted assumption made by respondent and undoubtedly arising from the fact that the Illinois Court cited one New York case under two different names in the course of its opinion. A mere reading of the opinion (fols. 29-42) demonstrates that no attempt was made to differentiate between the New York law and the Illinois law. The cases cited by respondent as proof of the New York law bear only superficial resemblance to the case at bar.

The New York law is clear that where one seeks to avoid a contract obligation because of alleged illegality arising out of provisions of the type here involved, he will not be permitted to do so where he has had the advantage of the benefits under the contract. In *Bonta* v. *Gridley,* 77 App. Div. 33, 78 N. Y. Supp. 961, there was a contract which provided for the election and continuance in office of plaintiff as an officer of a bank for a period of five years. This provision was interposed as a defense to an action for damages for breach of the contract, on the ground that the entire contract was void as against public policy. The Appellate Division of the Supreme Court of the State of New York held that such a defense could not be urged by

a party who had accepted and retained the benefits of the contract, stating:

> "One who accepts and retains the benefits of a contract cannot allege as a defense to an action upon it that it is void as against public policy" (at p. 39).

In the case at bar the decedent obtained the benefits of the contract, consisting of many hundreds of thousands of dollars. The corporation created under and by virtue of that contract is now one of the nation's largest transporters of natural gas. In addition, approximately $350,000.00 was received by the decedent, by way of reimbursement from the corporation under this agreement. While the Illinois Appellate Court referred to this sum as having been received by petitioner, (p. 18, Transcript of Record), the record (p. 8, Par. I and Ex. A, Par. 9, p. 15 this brief) clearly shows that such amount was to have been received by the decedent, not the petitioner, and there was no basis in fact for the contrary statement by the Illinois Appellate Court.

In the absence of an agreement *malum in se,* the New York law does not permit a litigant to assert illegality in an agreement and at the same time retain the fruits of that agreement. Two recent decisions in the New York State Court of Appeals affirm this principle. In *Rosasco Creameries* v. *Cohen,* 276 N. Y. 274, 11 N. E. 2nd 908, the plaintiff had delivered a quantity of milk to the defendant pursuant to a contract. In a suit to recover upon the contract the defendant maintained that the agreement was illegal and unenforceable because the plaintiff was not licensed to sell milk and that it was unlawful, under a statute, to sell milk without such license.

Recovery on the contract was allowed, the court stating:

> "Illegal contracts are generally unenforcible. Where contracts which violate statutory provisions are merely *malum prohibitum,* the general rule does not always apply. If the statute does not provide

> expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied. See Williston on Contracts, vol. 3, § 1789; vol. 5 (2d Ed.) § 1630. Cf. American Law Institute, Restatement of the Law of Contracts, §§ 548, 600." (at p. 279)

The same principle was applied in *Baksi* v. *Wallman,* 62 N. Y. Supp. 2nd 26, affirmed 297 N. Y. 456, 74 N. E. 2nd 172. In that case recovery under a contract for services performed by a boxing manager for a prize-fighter was allowed despite the fact that the manager had not been licensed, as required by law, by the State Boxing Commission.

The New York law is clear that under the circumstances of the contract in suit, all that was done is perfectly legal. In *Lorillard* v. *Clyde,* 86 N. Y. 384, persons about to form a corporation provided for the method of controlling the corporation. In rejecting the claim that the agreement was therefore invalid as against public policy, the court stated:

> "I can see no objection on the score of public policy, to an agreement between parties about to form a corporation agreeing upon the general plan upon which it is to be organized and conducted, so long as nothing is provided for inconsistent with the provisions of the statute, or immoral in itself. An agreement providing for the details of management made in advance, might not be binding upon the trustees of the corporation when organized, but such an agreement is not illegal." (at p. 390)

In the case at bar, at the time the agreement was made there were neither stockholders nor a corporation. The original stockholders of the corporation to be organized under the agreement were to be petitioner and respondent's

decedent. While it was contemplated that there would ultimately be other stockholders, that situation did not make illegal an agreement legal when executed. As the court stated in *Lorillard* v. *Clyde, supra,* the agreement "might not be binding upon the trustees of the corporation when organized, but such an agreement is not illegal." It must be borne in mind that enforcement of the agreement is not here being sought against the corporation which was organized under the agreement in suit, or the trustees, directors, or officers thereof, but only against the other party to the agreement, Victor S. Johnson, who partially performed the contract in suit during his life, now deceased, and herein represented by his administrator.

The cases on the New York law cited by respondent all involve situations in which a majority sought, by agreement, to take advantage of a minority in the corporation, and it was upon that ground that the contracts there in suit were held invalid. Respondent carefully omits the citation of *Clark* v. *Dodge,* 269 N. Y. 410, 199 N. E. 641, where the Court of Appeals of the State of New York distinguished *McQuade* v. *Stoneham,* 263 N. Y. 223, 189 N. E. 235, cited by respondent, and upheld the validity of an agreement entered into by all stockholders, which agreement provided for the indefinite continuance in office of the plaintiff.

Summary

Two federal questions, both cognizable by this court, are involved herein. One is the construction of a federal statute, to wit: the Federal Natural Gas Act. The other is the issue of due process. Petitioner is content, as to the Natural Gas Act, to rely upon his main brief in demonstrating that the construction given to that Act by the Illinois courts is contrary, not only to the wording of the act, but also to the legislative history thereof as exemplified by a specific amendment of the Act. As to the denial

of due process, respondent urges that there was a determination on independent State grounds, which bars review by this court. As set forth in our main brief, the fact that the contract was executed in New York and that no part of the contract was executed or performed or was intended to be performed in Illinois presents the very situation involved in *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 78 L. ed. 1178, where this court held that it was a violation of the due process clause of the U. S. Constitution, under those circumstances, to apply the local law. Only where the contract is repugnant to the vital interests of the state of the forum, may the courts of that state interfere with the performance of a contract made and performed outside the State. A reading of the contract in suit demonstrates that no such repugnancy could possibly exist in the contract at bar.

The lengthy discussion in respondent's brief (pp. 12-13) concerning *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co., supra,* serves only further to demonstrate the basic fact that the Mississippi courts in that case did apply the Tennessee law to the contract as required by this court.

As to the Federal Natural Gas Act, this court has fully reviewed and annotated the history of this legislation: (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U. S. 507, 514-51, 92 L. ed. 128, 136-140; *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 689, 690, 91 L. ed. 1742, 1747, 1748; *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 601-603, 89 L. ed. 1206, 1222-1223; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 609-613, 88 L. ed. 333, 348-350.)

The language and the history of that Act make it conclusively appear that the Act was never intended to apply to a situation where the corporation was not actually

engaged in the transportation or sale for resale of natural gas, in interstate commerce, except, by amendment, where the corporation is about to construct a pipe line (pp. 20-28, Petitioner's Main Brief).

CONCLUSION

The writ of certiorari sought by petitioner should be granted in order to prevent a manifest injustice involving the deprivation of petitioner's constitutional rights. The construction of the Federal Natural Gas Act by the Illinois courts was contrary to the expressed intention of Congress; and the application by the Illinois courts of local public policy to a foreign contract violated petitioner's constitutional rights.

Respondent, by the use of a series of legal maneuvers in the courts of Illinois, has been able to convert the issue of illegality of contract from a shield to prevent injustice into a sword to perpetrate injustice, by retaining the very substantial fruits of an alleged illegal contract, partially performed by decedent (fols. 7-8) and fully performed by petitioner. That contract was stamped illegal by the courts of Illinois, a State which had no reasonable connection with or control over the contract and whose jurisdiction depended solely upon the fortuitous circumstance that by virtue of decedent's death the claim under the contract could not be prosecuted elsewhere than in the State of decedent's residence to wit: the State of Illinois.

Dated, New York, September 15, 1950.

Respectfully submitted,

ALEXANDER KAHAN,
Attorney for Petitioner.

Of Counsel:

JOHN J. O'CONNOR,
HARRY J. PASTERNAK.

EXHIBIT "A"

CURTIS B. DALL CORPORATION
70 WALL STREET
New York

Telephone HAnover 2-0652-3

March 5, 1940

Mr. Victor S. Johnson,
c/o Brokaw, Dixon & McKee,
120 Broadway,
New York, N. Y.

Dear Mr. Johnson:

This letter will set forth the various points upon which you and I hereby have come to an agreement upon, and which, from an engineering point of view, has the approval of Messrs. Brokaw, Dixon & McKee.

In consideration of my agreeing to go to Nashville, Tennessee, in the next few days, and actively taking charge of the original finance program for raising the necessary preliminary funds which will enable the engineering and preliminary financing work of a corporation known as Corporation "A", and/or its successor the "B" Corporation, said Corporation to be a pipe line company bringing natural gas from northern Louisiana to middle Tennessee markets, and in further consideration of the Curtis B. Dall Corporation (New York), 70 Wall Street, New York City, being hereby designated by yourself as a Corporation empowered to negotiate and develop a suitable financial program for the handling of this enterprise, you hereby agree to the following:

1. To take immediate legal steps to have a suitable contract prepared between the Eastern Tennessee Oil & Gas Company, of which you are president, and the Corporation to be formed and known as the Tennessee Natural Gas Transmission Corporation (The "A" Corporation), which contract among other things will convey natural gas interests in the Sunbright properties and also convey the natural gas franchise for the City of Knoxville, Tennessee, now in the name of W. A. Messer, Trustee, said contract to be acceptable to the "A" Corporation as to details, and represent your out-of-pocket expense which amounts to approximately $349,800, payment for same to be made in the form of preferred and common stock of the "B" Corporation, as you may elect.

2. Set-up, with the aid of myself, a Board of Directors in the "A" Corporation which will include Mr. Spurlock of Chattanooga, if he will accept, yourself, Mr. A. Faison Dixon of 120 Broadway, New York City, myself of 70 Wall Street, New York City, and Nashville, Tennessee, Mr. Tom Shriver of Nashville, Tennessee. Other directors to be added, and we have the right to substitute, should it be necessary, any of the aforesaid except Messrs. Johnson, Dixon, and Dall; Cause a meeting of these Directors to be held to elect me as President of the "A" Corporation and Mr. J. E. Buckingham as its Treasurer.

3. You will endeavor to cause a contract to be properly drawn up between The Tennessee Natural Gas Corporation, of Nashville and the "A" Corporation, whereby the former conveys to the latter for the consideration of $100,000.00, the natural gas franchise

for the City of Nashville, Tennessee. The terms of this $100,000.00 payment are to be in some suitable form later to be agreed to by the principal underwriters, which will carry a percentage of the "B" Corporation's preferred stock and its common stock. It is understood that all these payments are to be arranged out of the final financing of the "B" Corporation.

4. It is agreed between us that in some suitable and legal way for a nominal cash consideration, I am to acquire from you not less than 27,000 shares of the "A" Corporation's common stock. This amount of stock is to be due me and arranged for at the time the original financing of the "B" Company is arranged for. It is further agreed between us that as a result of our joint efforts, if we can save 90,000 shares of the "A" Corporation's common stock in connection with the raising of $75,000.00 of a $150,000.00 program, that you and I are to personally share on a fifty-fifty basis said 90,000 shares or any part thereof which we may be able to save and which stock shall accrue to us in some legal manner with a nominal consideration to meet with any existing laws of the State of Tennessee.

5. It is agreed between us that I have the right to become the President of the "B" Corporation or continue in the office of President of the "A" Corporation after the major financing is completed, and at a salary commensurate with such an office.

6. It is agreed that we will exert our joint efforts to properly amend a so-called subscription agreement whereby the preliminary funds are being raised for

the "A" Corporation along lines to be agreed to by Mr. Shriver, yourself, and myself in consultation with Mr. Thompson.

7. It is agreed between us that Messrs. Brokaw, Dixon & McKee, through their Mr. Dixon, hereby agree to serve as official consultant engineering and geological firm for the "A" Corporation or its successor the "B" Corporation at their customary fees.

8. It is agreed between you and myself that in some suitable manner, as long as I am associated with you in this undertaking, I will have an interest with you and your associates in any originating natural gas corporation which may be formed at a later date with the purpose in mind of gathering mineral leases containing natural gas, and producing same and selling them either directly or indirectly to companies who may in turn sell the natural gas to the "B" Corporation.

9. You hereby agree that upon the signing of this letter, to convey to me, personally, the sum of $1,000.00, and on the First of April, 1940, the sum of $1,000.00, on the First of May, 1940, the sum of $1,000.00, and on the First of June, 1940, the sum of $1,000.00. Should the original financing plans be completed within thirty days, as we estimate, then and in that event, this personal commitment on your part, may be transferred and may properly become the obligation of the "A" Corporation, and this program of $1,000.00 monthly payments to me on the First of each month, shall and you hereby agree to have continued in force to and including the month of September, 1940, at which time I estimate that the major financing pro-

gram will be well on its way toward completion. It is understood that all money advanced by you in connection herewith shall be repaid or due to you from the "A" Corporation. It is also understood that you are to be repaid by the "A" Corporation or the Natural Gas Corporation of such moneys as have been advanced to Wade Thompson by yourself and that have been advanced by the Marshall Brothers and which I understand you have guaranteed payment of.

If our original financing program is completed in March, Messrs. Brokaw, Dixon & McKee should be able to give us a fairly definitive picture in general in June, at which time steps can be taken to line up a definite major financing program. I estimate roughly sixty days for necessary S.E.C. work, and including a factor for unexpected delays, we should be able to go to Market early in September, 1940.

If the foregoing meets with your entire approval, and also has the approval of Messrs. Brokaw, Dixon & McKee from a general engineer's point of view, will you kindly note your approval beside the word "ACCEPTED", so that we may mutually regard this document as a binding contract.

Very truly yours,

CURTIS B. DALL

CBD:EP

Accepted VICTOR S. JOHNSON
Approved A. FAISIN DIXON.